

13

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GOLDEN STATE THEATRE & REALTY COR-  
PORATION, a California corporation,  
Petitioner,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of the Record

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Upon Petition to Review a Decision of the United States  
Board of Tax Appeals.

FILED

OCT - 1 1941

PAUL F. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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GOLDEN STATE THEATRE & REALTY COR-  
PORATION, a California corporation,  
Petitioner,

vs.

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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer .....	7
Appearances .....	1
Assignment of Errors (Board of Tax Appeals)	15
Certificate of Clerk of Board of Tax Appeals.....	37
Decision .....	11
Designation of Contents of Record on Review (Circuit Court of Appeals).....	38
Docket Entries .....	1
Notice of Filing Petition for Review.....	18
Notice of Filing Praecipe.....	36
Opinion, Memorandum .....	9
Order Denying Motion for Review by Entire Board .....	11
Order Denying Reconsideration.....	12
Petition .....	3
Petition for Review.....	12
Praecipe (Board of Tax Appeals).....	34
Review:	
Assignment of Errors (Board of Tax Ap- peals) .....	15

	Page
Designation of Contents of Record on (Circuit Court of Appeals).....	38
Petition for .....	12
Præcipe (Board of Tax Appeals).....	34
Statement of Points on (Circuit Court of Appeals) .....	38
Statement of Points on Review (Circuit Court of Appeals) .....	38
Stipulation of Facts.....	19
Exhibits to Stipulation of Facts:	
A—Letter dated December 5, 1939 to Golden State Theatre and Realty Corporation from Treasury Department, Internal Revenue Service .....	25
B—Table showing acquisition of San Francisco Wigwam Theatre by Golden State Theatre & Realty Corporation, per stock records.....	29
C—Transcript of note payable—Cecil B. DeMille Productions, Inc.....	30
D—Minutes of meeting of Board of Directors of San Francisco Wigwam Theatre Co.....	31

## APPEARANCES:

For Taxpayer:

L. S. HAMM, Esq.,  
B. E. KRAGEN,  
ADRIAN A. KRAGEN, Esq.  
LIONEL B. BENAS, Esq.

For Comm'r:

ARTHUR L. MURRAY.

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Docket No. 101526

GOLDEN STATE THEATRE AND REALTY  
CORPORATION, a California Corporation,  
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### Docket Entries

1940

Feb. 21—Petition received and filed. Taxpayer notified. (Fee paid).

Feb. 21—Copy of petition served on General Counsel.

Feb. 21—Request for circuit hearing in San Francisco, Calif., filed by taxpayer. 2/21/40 copy served.

Mar. 26—Answer filed by General Counsel.

Mar. 29—Copy of answer served on taxpayer. San Francisco, Calif., Calendar.



1940

Aug. 13—Hearing set Oct. 7, 1940.

Oct. 15—Hearing had before Mr. Sternhagen on merits. Submitted. Stipulation of facts and appearance of Lionel B. Benas, Esq., filed. Petitioner's brief due 11/14/40; Respondent's 12/14/40; Reply 1/3/41.

Nov. 12—Transcript of hearing of Oct. 15, 1940, filed.

Nov. 13—Brief filed by taxpayer. 11/14/40 copy served on General Counsel.

Nov. 28—Motion for extension to Jan. 14, 1941 to file brief filed by General Counsel. 11/28/40 granted.

1941

Jan. 14—Reply brief filed by General Counsel.

Feb. 3—Reply brief filed by taxpayer. 2/3/41 copy served on General Counsel.

Mar. 28—Memorandum opinion rendered, Sternhagen, Div. 10. Decision will be entered for the respondent.

Mar. 28—Decision entered, Sternhagen, Div. 10.

Apr. 28—Motion for consideration and review by entire Board and in the alternative that a rehearing be granted to the petitioner, filed by taxpayer.

Apr. 29—Order denying review by the Full Board and insofar as the motion for reconsideration and rehearing is referred to Division #10 for action, entered. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.



1941

May 3—Order denying Board review, entered.

July 16—Petition for review by United States Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

July 16—Proof of service filed by taxpayer.

Aug. 4—Praecipe for transcript filed by taxpayer—proof of service thereon.

Aug. 4—Proof of service filed by taxpayer. [2]

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United States Board of Tax Appeals

Docket No. 101526

GOLDEN STATE THEATRE & REALTY CORPORATION, a California corporation,  
Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF  
INTERNAL REVENUE,  
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, San Francisco Division, IRA:90-D DCE, dated December 5, 1939, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation organized and existing under and by virtue of the laws of the

State of California and having its office and principal place of business at No. 25 Taylor Street, at the City and County of San Francisco in said state. The return for the period here involved was filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner [3] on December 5, 1939.

3. The taxes in controversy are income and undistributed profits taxes for the calendar year 1936 and the amount in question is the sum of \$13,277.09, being a portion of a total asserted deficiency in the sum of \$15,562.51.

4. The determination of taxes set forth in the notice of deficiency is based upon the following errors:

(a) The determination that there was received from San Francisco Wigwam Theatre Co., a California corporation and a wholly owned and fully controlled subsidiary of Golden State Theatre & Realty Corporation, likewise a California corporation, petitioner herein, 4397 shares of the capital stock of said petitioner and that said alleged receipt is taxable to petitioner as a dividend under the provisions of Section 115 (a) and (j) of the Revenue Act of 1936.

(b) The determination that said 4397 shares of petitioner's capital stock were of a value to petitioner, at the date of said alleged receipt, of \$65,295.45.

(c) The determination that said 4397 shares of petitioner's capital stock was not Treasury stock of petitioner while in the hands of San Francisco Wigwam Theatre Co., a wholly owned and fully controlled subsidiary.

5. The facts upon which petitioner relies as a basis of this proceeding are as follows: [4]

(a) On July 8, 1931, petitioner herein, Golden State Theatre & Realty Corporation, owned and held of record all of the issued and outstanding capital stock of San Francisco Wigwam Theatre Co. and ever since said date has been and now is the owner and record holder thereof. During the period of time commencing on July 8, 1931 and continuing through October 2, 1931, San Francisco Wigwam Theatre Co. acquired 4397 shares of the capital stock of petitioner, the parent corporation which stock was purchased by San Francisco Wigwam Theatre Co. for cash from persons other than petitioner.

(b) From the time of its acquisition by said San Francisco Wigwam Theatre Co., said 4397 shares of stock, and all of it, was Treasury stock of said Golden State Theatre & Realty Corporation and had no value to petitioner during any of said period and was not an asset of any value to petitioner since the date hereinabove mentioned, or during any of said period.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that there was no dividend from San Francisco Wigwam Theatre Co. to petitioner and that the capital stock of peti-

tioner held by San Francisco Wigwam Theatre Co. was at all times since July 8, 1931, Treasury stock of petitioner and of no value to it; and for such other and further relief as may be meet and proper in the [5] premises.

L. S. HAMM

B. E. KRAGEN

ADRIAN A. KRAGEN

Counsel for Petitioner

713 Loew's Warfield Building  
San Francisco, California.

State of California

City and County of San Francisco.—ss.

E. H. Emmick, being duly sworn, says that he is an officer, to-wit, the president, of petitioner and that he is duly authorized to verify the foregoing petition; that he has read said petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

E. H. EMMICK

Subscribed and sworn to before me this 15th day of February, 1940.

(Seal)

RUTH H. COSGROVE

Notary Public In and for the City and County of  
San Francisco, State of California.

[For Ex "A" See Ex. "A" Attached Stip.  
of Facts.]

[Endorsed]: U. S. B. T. A. Filed Feb. 21, 1940.

[6]



[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that the notice of deficiency was mailed to the petitioner on December 5, 1939; denies that a complete copy of the notice of deficiency is attached to the petition as alleged in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1936; denies the remaining allegations contained in paragraph 3 of the petition.

4 (a) to (c), inclusive. Denies that the determination [7] of tax set forth in the notice of deficiency is based upon errors as alleged in paragraph 4 and subparagraphs (a) to (c) thereunder of the petition.

5(a). Admits that the petitioner owns all the issued and outstanding capital stock of San Francisco Wigwam Theatre Co., and that during the period of time commencing July 8, 1931, and continuing through October 2, 1931, said San Francisco Wigwam Theatre Co. acquired 4,397 shares of capi-

tal stock of petitioner; for lack of information, and for other reasons, denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b). Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL

TMM

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD

T. M. MATHER,

ARTHUR L. MURRAY,

Special Attorneys,

Bureau of Internal Revenue.

ALM:sob 3/18/40

[Endorsed]: U. S. B. T. A. Filed Mar. 26, 1940.

[8]

[Title of Board and Cause.]

Lional B. Benas, Esq., for the petitioner.

Arthur L. Murray, Esq., for the respondent.

### MEMORANDUM OPINION

Sternhagen: The Commissioner determined a deficiency of \$15,562.51 in petitioner's income tax for 1936. The facts are found as stipulated.

Petitioner is a California corporation doing business in San Francisco. In the taxable year it owned all of the shares of San Francisco Wigwam Theatre Co. As a result of purchases made in 1931, the Wigwam corpora- [9] tion acquired 5,030 shares of petitioner's stock. Of these, 633 shares were transferred in that year to Bolton. The remaining 4,397 shares were held by the Wigwam corporation until 1936 and then transferred to petitioner pursuant to a resolution of the Wigwam directors. The transfer was regarded by the directors as a "donation," and was charged by the Wigwam corporation to earned surplus. The value of the 4,397 shares when transferred in 1936 was \$65,295.45.

The Commissioner held that this amount was taxable to petitioner as a dividend under Revenue Act of 1936, section 115 (a) and (j). The petitioner contests this and constructs its argument upon the unity of the two corporations in view of the petitioner's complete ownership of the Wigwam shares. It treats the 4,397 shares owned by Wigwam as if they were treasury stock of petitioner and, under the California Civil Code, section 342, not to be



regarded as outstanding or as an asset available for dividends. This conception of unity of the two corporations is not now permissible, since Congress, by discontinuing the recognition of consolidated returns, has required the treatment of separate corporations separately, irrespective of affiliation. This is sufficient to overcome any possible reasoning to be derived from *Southern Pacific Co. v. Lowe*, 247 U. S. 330, and *Gulf Oil Corporation v. Lewellyn*, 248 U. S. 71, upon which petitioner heavily relies. Irrespective of whether the petitioner's shares when owned by the Wigwam corporation could be regarded for purposes of California law as treasury stock, this would be irrelevant to the application of the Federal revenue.

For the purpose of the present decision it is enough that this was a distribution by the Wigwam corporation to petitioner, its shareholder, which, so far as the record shows, was within the statutory definition of dividend, the value of which is not disputed.

Enter:

Decision will be entered for the respondent.

Entered Mar. 28, 1941. [10]

United States Board of Tax Appeals

Washington

Docket No. 101526

GOLDEN STATE THEATRE & REALTY CORPORATION,

Petitioner.

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

In accordance with the Board's Memorandum Opinion, entered March 28, 1941, it is

Ordered and decided that there is a deficiency of \$15,562.51 in income tax for 1936.

Enter:

(Seal)

(S) J. M. STERNHAGEN

Member [11]

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[Title of Board and Cause.]

### ORDER DENYING REVIEW BY THE BOARD

On April 28, 1941, petitioner filed a motion in respect of the Memorandum Opinion of Division No. 10 (Sternhagen) entered March 28, 1941, asking for reconsideration; review by the entire Board; and in the alternative for a rehearing. The motion insofar as it asks for review by the entire Board

has been given careful consideration and it is not believed that it should be granted. Accordingly, the motion for review by the entire Board is hereby denied.

The motion insofar as it asks for reconsideration and a rehearing is referred to Division No. 10 (Sternhagen) for action.

(Seal)                      (Signed) C. R. ARUNDELL,  
Chairman.

April 29, 1941. [12]

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[Title of Board and Cause.]

#### ORDER DENYING RECONSIDERATION

The motion filed by the petitioner on April 28, 1941, for reconsideration is denied.

(Seal)                      (Signed) J. M. STERNHAGEN,  
Member.

May 3, 1941. [13]

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[Title of Board and Cause.]

#### PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States  
Circuit Court of Appeals for the Ninth Cir-  
cuit:

Golden State Theatre & Realty Corporation, pe-  
titioner herein, herewith files this, its petition for

review by the United States Circuit Court of Appeals for the Ninth Circuit, of a decision of the United States Board of Tax Appeals entered on March 28, 1941, finding a deficiency in income tax in the amount of \$15,562.51, payable by petitioner for the year 1936, together with an order denying review of said decision by the entire Board, made on April 29, 1941 and an order denying reconsideration thereof made on May 3rd, 1941, and respectfully shows:— [14]

### I.

Petitioner is a corporation organized and existing under the laws of the State of California and having its principal office and place of business at No. 995 Market Street, at the City and County of San Francisco, in said State. The return of income tax in respect of which the aforementioned liability arose was filed by petitioner with the Collector of Internal Revenue for the First District of California, which is located within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

### II.

The respondent determined an income tax deficiency against petitioner for the taxable year ended December 31, 1936, from which assessment petitioner appealed to the United States Board of Tax Appeals, seeking a redetermination thereof and asserting error. The decision of the United States Board of Tax Appeals sustained the respondent and



said decision was entered by said Board on March 28, 1941. Petitioner filed a motion for review by the entire Board, which was denied on April 29, 1941, and filed a motion for reconsideration, which was denied on May 3, 1941.

### III.

Petitioner has been engaged in the theatre business in the City and County of San Francisco and elsewhere in the State of California, for approximately fifteen years last [15] past and immediately preceding the year 1936. San Francisco Wigwam Theatre Co. is also a California corporation with its principal place of business at San Francisco, California. Both of these corporations were in existence during all of the times herein referred to. In the year 1931 and continuously up to and including the present time, petitioner owned all of the issued and outstanding capital stock of San Francisco Wigwam Theatre Co., and during said period of time San Francisco Wigwam Theatre Co. was and is a wholly owned and controlled subsidiary of petitioner.

During the year 1931, said San Francisco Wigwam Theatre Co. acquired by purchase from outside parties 4397 shares of the capital stock of petitioner. Certificates evidencing these shares were issued to and in the name of said San Francisco Wigwam Theatre Co. and so stood of record, continuously, until December 15, 1936. On May 12, 1936, the Board of Directors of San Francisco Wig-

wam Theatre Co. by resolution authorized the transfer of said 4397 shares by the subsidiary to the parent, petitioner herein, and on December 15, 1936, the transfer was made and new certificates evidencing said shares were issued in the name of petitioner.

The value of the shares at the time of their transfer to petitioner was \$65,295.15 and respondent held that this amount was taxable to petitioner as a dividend under sections 115(a) and 115(j) of the Revenue Act of 1936. Petitioner contended that this was not a taxable dividend because [16] the 4397 shares of petitioner's stock held by San Francisco Wigwam Theatre Co. was treasury stock of petitioner and in receiving its own stock petitioner received nothing of value to itself.

The Board of Tax Appeals held: That there was a distribution by San Francisco Wigwam Theatre Co. to petitioner, its shareholder, which was within the statutory definition of a dividend.

#### IV.

In making its decision as aforesaid, the United States Board of Tax Appeals committed the following errors upon which the petitioner relies as the basis of this proceeding:

1. The Board erred in the determination that there was received from San Francisco Wigwam Theatre Co., a California corporation and a wholly owned and fully controlled subsidiary of Golden State Theatre & Realty Corporation, likewise a Cali-

ifornia corporation, petitioner herein, 4397 shares of the capital stock of petitioner and that said alleged receipt is taxable to petitioner as a dividend under the provisions of sections 115(a) and 115(j) of the Revenue Act of 1936.

2. The Board erred in the determination that said 4397 shares of petitioner's capital stock were of a value to petitioner, at the date of said alleged receipt, of \$65,295.45.

3. The Board erred in the determination that said [17] 4397 shares of petitioner's capital stock were not treasury stock of petitioner while in the hands of San Francisco Wigwam Theatre Co., a wholly owned and fully controlled subsidiary.

4. The Board erred in concluding that provisions of California law under which shares of the stock of a parent corporation held by a wholly owned and controlled subsidiary may be regarded as treasury stock, are irrelevant to the application of the Federal Revenue Act.

5. The Board erred in its conclusion that because Congress has discontinued the recognition of consolidated returns, the unity of the two corporations in view of petitioner's complete ownership of the stock of San Francisco Wigwam Theatre Co. cannot be considered.

6. The Board erred in determining income tax deficiency for the year 1936 in the sum of \$15,562.51.

7. The Board erred in not ordering and deciding in favor of petitioner and against respondent.

Wherefore, your petitioner prays that this Hon-



orable Court review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same and direct the said Board to enter a decision in favor of petitioner, determining that there is no deficiency in income tax for the year 1936 due from petitioner; and for the entry of such further orders and directions as shall by this Court [18] be deemed meet and proper, in accordance with law.

L. S. HAMM,

B. E. KRAGEN,

Attorneys for Petitioner.

Address: 713 Loew Building, San Francisco, California.

[Endorsed]: U.S.B.T.A. Filed July 16, 1941.

[18a]

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State of California

City and County of San Francisco—ss.

L. S. Hamm, being duly sworn, says:—

I am one of the attorneys for the petitioner in this proceeding; I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This petition is not filed for the purpose of delay, and I believe the petitioner is justly entitled to the relief sought.

L. S. HAMM.

Subscribed and sworn to before me this 9th day of July, 1941.

(Seal) RUTH H. COSGROVE,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission expires August 16, 1943. [19]

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[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR RE-  
VIEW AND ACCEPTANCE OF SERVICE  
THEREOF

To:

Commissioner of Internal Revenue  
Internal Revenue Building  
Washington, D. C.

Hon. J. P. Wenchel, Attorney for Respondent  
Chief Counsel  
Bureau of Internal Revenue  
Internal Revenue Building  
Washington, D. C.

You are hereby notified that on the 16th day of July, 1941, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above entitled cause, was filed with the Clerk of the Board.

A copy of the petition as filed is attached hereto and served upon you.

Dated July 9, 1941.

(S) L. S. HAMM

(S) B. E. KRAGEN

Attorney for Petitioner.

Address: 713 Loew Building, San Francisco, California. [20]

Personal service of the foregoing notice of filing and a copy of the petition for review is hereby acknowledged this 16th day of July, 1941.

(S) J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: U.S.B.T.A. Filed July 16, 1941.

[21]

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[Title of Board and Cause.]

### STIPULATION

It Is Hereby Stipulated and agreed by and between the parties hereto, by their respective counsel of record, that this stipulation shall be received in evidence at the trial of the above entitled proceeding and shall be sufficient evidence of the truth of each and every statement made therein; except that any of the parties to said proceeding may, at the trial thereof, offer any additional competent and relevant

evidence, not inconsistent with the facts herein stipulated.

1. It is stipulated that the tax in controversy is income tax for the calendar year 1936 and the amount in question is the sum of \$13,276.99, being a portion of a total asserted deficiency in the sum of \$15,562.51. [22]

2. It is stipulated that although by inadvertence a complete copy of the notice of deficiency was not attached to the petition filed herein, a full and complete copy of said notice of deficiency may be and the same is attached to this stipulation, marked Exhibit "A" and made a part hereof.

3. It is stipulated that petitioner Golden State Theatre & Realty Corporation is a California corporation having its principal place of business at No. 25 Taylor Street in the City and County of San Francisco, State of California.

4. It is stipulated that San Francisco Wigwam Theatre Co. is a California corporation with its principal place of business at No. 25 Taylor Street, San Francisco, California.

5. It is stipulated that at the dates and times of the transactions hereinafter set forth, to-wit, in the year 1931 up to and including the present time, petitioner Golden State Theatre & Realty Corporation owned all of the issued and outstanding capital stock of San Francisco Wigwam Theatre Co. and that during all of said period and at the present time San Francisco Wigwam Theatre Co. was and is a wholly owned subsidiary of petitioner Golden



State Theatre & Realty Corporation; that a statement of the dates and times at which Golden State Theatre & Realty Corporation acquired the said stock of San Francisco Wigwam Theatre Co. is hereto attached, marked Exhibit "B" and made a part hereof. [23]

6. It is stipulated that on July 8, 1931, 2500 shares of the capital stock of petitioner Golden State Theatre & Realty Corporation were purchased from Victoria Mariani and on July 8, 1931, by check No. 9262 of the San Francisco Wigwam Theatre Co., she was paid the sum of \$5000 and on July 8, 1931, by check No. 9264 of the San Francisco Wigwam Theatre Co., she was paid the sum of \$20,000.

7. It is stipulated that on October 2, 1931, 2530 shares of the capital stock of petitioner Golden State Theatre & Realty Corporation were purchased from Cecil B. DeMille Productions, Inc. for a total sum of \$30,935 and that said sum was paid in forty-nine installments on the dates and in accordance with the schedule attached hereto, marked Exhibit "C" and made a part hereof; that each of the checks issued and as numbered in Exhibit "C" were checks of the San Francisco Wigwam Theatre Co.

8. It is stipulated that on October 2, 1931, 633 shares of said Golden State Theatre & Realty Corporation stock was transferred by San Francisco Wigwam Theatre Co., to David Bolton for the sum of \$7,733.75, and the General Journal of the San

Francisco Wigwam Theatre Co., at page 57 shows the following entry:—

	Debit	Credit
“Accts Receivable Dave Bolton	7733.75	
To Stocks and Bonds		7733.75
Sale 633 shares Capital Stock		
Golden State T & R Corp upon the same		
terms as above purchase.”		

[24]

9. It is stipulated that on September 30, 1931, R. A. McNeil, a Vice President of the Golden State Theatre & Realty Corporation, was paid a commission of \$2500.00 by San Francisco Wigwam Theatre Co., in connection with the purchase of stock by San Francisco Wigwam Theatre Co., from Victoria Mariani as described in paragraph 6 above. That on January 18, 1937, the said R. A. McNeil refunded the sum of \$2500.00 by paying the said sum to the Golden State Theatre & Realty Corporation, and said amount was credited to the earned surplus account of the Golden State Theatre & Realty Corporation.

10. It is stipulated that the cost of said 4,397 shares of capital stock of Golden State Theatre & Realty Corporation, which were paid for by San Francisco Wigwam Theatre Co., was \$50,701.25. This cost included the said commission of \$2,500 paid by the San Francisco Wigwam Theatre Co. to R. A. McNeil.

11. It is stipulated that stock certificates representing 4397 shares of the Capital Stock of Golden State Theatre & Realty Corporation purchased from Victoria Mariani and Cecil B. DeMille Productions,

Inc., referred to in paragraphs 6, 7, 8 and 10 were cancelled on October 8, 1931, and new certificates were issued on the same day in the name of San Francisco Wigwam Theatre Co. That the said certificates in the name of San Francisco Wigwam Theatre Co., were cancelled on December 15, 1936, and new certificates issued on said date in the name of Golden State Theatre & Realty Corporation.

It is further stipulated that the aforesaid 4397 shares of stock acquired as referred to in paragraphs 6, 7, 8 and 10 were carried as a debit in the Stocks and Bonds Account of [25] the San Francisco Wigwam Theatre Co., until December 31, 1936; that on December 31, 1936, a charge of \$50,701.25 was made to the earned surplus account of the San Francisco Wigwam Theatre Co., and a corresponding credit made in the stocks and bonds account of San Francisco Wigwam Theatre Co.; that on January 18, 1937, \$2500.00 representing the refund of the commission paid to R. A. McNeil, was credited to the earned surplus account of petitioner, Golden State Theatre & Realty Corporation.

12. It is stipulated that the following entries were made on the books of the Golden State Theatre & Realty Corporation relative to the transfer of the aforesaid stock:

	Debit	Credit
"Journal page 4001—		
4-3-37		
Treasury Stock	\$43,970.00	
To Capital Surplus		\$43,970.00
4397 shares of G S owned by		
S F Wigwam Theatre Co.		
Donated"		



	Debit	Credit
"Journal—page 6-11		
Jan 2-1938		
Surplus	\$43,970.00	
Territory (?probably means		
Treasury) Stock		\$43,970.00
To reverse entry crediting		
surplus for treasury stock donated."		
	Debit	Credit
"Treasury Stock	\$43,970.00	
Donated Surplus Treasury Stock		\$43,970.00
For memo entry to record 4397		
shares of Treasury stock received		
from S. F. Wigwam Theatre Co."		

It is further stipulated that the entries of Jan. 2, 1938 were made at the direction of Robt. Folkoff, an independent C. P. A.—as the result of an audit which had been completed.

13. It is stipulated that on May 12, 1936, the San Francisco Wigwam Theatre Co., the subsidiary of petitioner, [26] passed a resolution at a meeting held on said day, which resolution is in words as particularly set forth in Exhibit "D" attached hereto and made a part hereof.

14. It is stipulated that the book value of 4397 shares of stock of Golden State Theatre & Realty Corporation as of December 31, 1936, according to the books of Golden State Theatre & Realty Corporation, was the sum of \$65,295.45.

COMMISSIONER OF INTER-  
NAL REVENUE

By J. P. WENCHEL

ACB

Attorneys

L. S. HAMM

B. E. KRAGEN

ACB 10-5-40

Attorneys for Petitioner [27]

EXHIBIT "A"

Treasury Department  
Internal Revenue Service  
433 Federal Office Building  
San Francisco, California  
Dec. 5 1939

Office of Internal Revenue Agent in Charge San  
Francisco Division.

IRA:90-D

DCE

Golden State Theatre & Realty Corporation,  
25 Taylor Street,  
San Francisco, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1936, discloses a deficiency of \$15,-562.51 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San

Francisco, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By F. M. HARLESS

Internal Revenue Agent in  
Charge.

H.J.B.

Enclosures:

Statement.

Form of waiver. [28]

### STATEMENT

San Francisco

IRA :90-D

DCE

Golden State Theatre & Realty Corporation,  
25 Taylor Street,  
San Francisco, California.

Tax Liability for the Taxable Year Ended December 31, 1936.

Income Tax

Liability—\$50,416.34

Assessed—\$34,953.83

Deficiency—\$15,562.51

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated December 16, 1938; to your protest dated January 25, 1939; to the statements made at the conferences held on March 22 and June 15, 1939.

### Adjustments to Net Income

Net income as disclosed by line 27 page 2 of return .....		\$301,395.69
Unallowable deductions and additional income:		
(a) Dividends—cash .....	\$11,240.00	
(b) Dividends—Property .....	65,295.45	76,535.45
	<hr/>	<hr/>
Net income adjusted .....		\$377,931.14

### EXPLANATION OF ADJUSTMENTS

(a) These dividends were from corporations as follows:	
North Beach Theatre Company.....	\$ 1,140.00
East Bay Theatre Company.....	3,000.00
Hollister Golden State Theatre Company.....	5,100.00
Republic Theatre Company.....	2,000.00
	<hr/>
	\$11,240.00
	[29]

Journal entries as at December 31, 1935, represent these dividends as accounts receivable. As the available evidence indicates that these dividends were not declared or available to the stockholders in 1935 and were actually paid or distributed in 1936, they are included in income from dividends for 1936.

(b) It is held that the 4,397 shares of your stock received from the San Francisco Wigwam Theatre

Company, a fully controlled subsidiary, had a value at the date of receipt of \$65,295.45 and that it is taxable to you as a dividend under the provisions of Section 115(a) and (j) of the Revenue Act of 1936.

### COMPUTATION OF TAX

Excess-profits Tax:

Taxable net income.....\$377,931.14

Less:

Dividends received credit (85% of  
\$269,684.45) .....\$229,231.78

10% of \$2,500,000.00 value of capital  
stock as declared in your capital  
stock tax return for year  
ended June 30, 1936. .... 250,000.00    479,231.14

Net income subject to excess-profits tax..... none

Total excess-profits tax..... none

Income Tax:

Normal Tax:

Taxable net income for normal tax computation.....\$377,931.14

Less:

(85% of dividends received from taxable domestic  
corporations) ..... 229,231.78

Normal tax net income.....\$148,699.36

[30]

8% of \$ 2,000.00 (Over \$ 0 to \$ 2,000).....\$ 160.00

11% of \$ 13,000.00 (Over \$ 2,000 to \$15,000)..... 1,430.00

13% of \$ 25,000.00 (Over \$15,000 to \$40,000)..... 3,250.00

15% of \$108,699.36 (Over \$40,000)..... 16,304.90

Total normal Tax .....\$ 21,144.90



## Surtax on Undistributed Profits:

Taxable net income .....	\$377,931.14
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Less:

Normal tax .....	21,144.90
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Adjusted net income .....	\$356,786.24
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Less:

Dividends paid credit .....	166,972.75
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Undistributed net income .....	\$189,813.49
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7% of \$35,678.62.....	\$ 2,497.50
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12% of \$35,678.62.....	4,281.43
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17% of \$71,357.25.....	12,130.73
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22% of \$47,099.00.....	10,361.78
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Total surtax .....	\$ 29,271.44
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Normal tax .....	21,144.90
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Total income tax (normal tax and surtax).....	\$ 50,416.34
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Income tax assessed (normal tax and surtax):

Original, account No. 401579—First California.....	34,853.83
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Deficiency of income tax.....	\$ 15,562.51
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[31]

## EXHIBIT "B"

ACQUISITION OF SAN FRANCISCO WIGWAM THEATRE  
CO. BY GOLDEN STATE THEATRE & REALTY COR-  
PORATION. PER STOCK RECORDS.

Date Acquired	Shares
Sept. 19, 1928.....	87
Mar. 7, 1929.....	43
Dec. 18, 1929.....	87
Dec. 18, 1929.....	341
Jan. 2, 1930.....	130

688 Fully owned prior to July 8, 1931.

Ledger shows this at \$68,700.00.

[32]

## EXHIBIT "C"

San Francisco Wigwam Theatre Co.

TRANSCRIPT OF NOTE PAYABLE—CECH B. DEMILLE  
PRODUCTIONS, INC.

Date	Item	Folio	Dr.	Cr.
Oct. 2, 1937	2530 shares G. S. T. & R. stock (Cost 12.22728 ea.) Int. 6%—Cash 20% 48 pay- ments	J 57		30,935.00
	Ck. No.			
Oct. 10, 1931	9521	AP. 637	6,187.00	
Nov. 9	9630	348	515.59	
Dec. 8	9750		515.59	
Jan. 8, 1932	9897	368	515.59	
Feb. 8	16		515.59	
March 8	130	384	515.59	
April 8	288		515.59	
May 9	410	404	515.59	
June 8	541		515.59	
July 8	648		515.59	
August 8	683		515.59	
Sept. 8	706		515.59	
Oct. 8	723	429	515.59	
Nov. 8	732		515.59	
Dec. 8	743		515.59	
Jan. 9, 1933	754	433	515.59	
Feb. 7	762	—	515.59	
March 13	767	434	515.59	
April 7	773	435	515.59	
May 8	780		515.59	
June 6	787	436	515.59	
July 8	796	437	515.59	
Aug. 8	801		515.59	
Sept. 8	805	438	515.59	
Oct. 9	812		515.59	
Nov. 9	816	439	515.59	
Dec. 7	824	440	515.59	



Date	Ck. No.	Folio	Dr.	Cr.
Jan. 8, 1934	828	441	515.59	
Feb. 8	833		515.59	
March 8	841	442	515.59	
April 9	846		515.59	
May 7	850	443	515.59	
June 7	853		515.59	
[33]				
July 9, 1934	857		515.59	
August 8	862	444	515.59	
Sept. 6	866		515.59	
Oct. 6	869	445	515.59	
Nov. 8	874	CD/1	515.59	
Dec. 29	878	CD/2	515.59	
Jan. 8, 1935	881	CD/1	515.59	
Feb. 8	886	CD/1	515.59	
Mar. 8	890		515.59	
Apr. 8	899	CD/2	515.59	
May 8	916	CD/3	515.59	
June 6	954	CD/4	515.59	
July 8	968	CD/5	515.59	
Aug. 8	980	CD/5	515.59	
Sept. 8	989	CD/5	515.59	
Oct. 8	1001	CD/1	515.27	
			30,935.00	30,935.00
[34]				

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## EXHIBIT "D"

### MINUTES OF MEETING OF BOARD OF DIRECTORS

Pursuant to the by-laws and to the call of the president at the annual shareholders meeting just held, a meeting of the newly elected Board of Directors of San Francisco Wigwam Theatre Co. was

held at the office of the corporation, No. 25 Taylor Street, San Francisco, California, at 11:30 o'clock on the morning of Tuesday, May 12, 1936. All Directors were present. Director Emmick took the chair and appointed L. S. Hamm to act as secretary of the meeting.

The chair stated that the first business is the election of officers and called for nominations for president. Director Emmick was nominated and as there were no further nominations he was declared duly elected and qualified. In like manner M. Naify was elected vice president, R. A. McNeil was elected treasurer and L. S. Hamm was elected secretary. The board then appointed Hazel Watson an assistant secretary to serve during the pleasure of the board and to have powers and duties commensurate with those of the secretary, in the absence of the latter.

The president then stated that with the advice and approval of the directors a new agreement of joint venture had been entered into by this corporation with a subsidiary corporation of Fox West Coast Theatres whereby the operations of the El Capitan Theatre and the operations of the Rialto Theatre, [35] the latter being owned by this corporation, are being carried on by Fox West Coast. The new agreement, which has the effect of cancelling a prior agreement, was presented and read to the board and, upon motion of Director McNeil, seconded by Director M. Naify, its execution was ratified and approved.

The president then stated that this corporation is the owner of 4397 shares of the capital stock of Golden State Theatre & Realty Corporation, which last named corporation owns all of the issued and outstanding stock of this corporation, with the exception of the qualifying shares held by the directors. He stated that in his opinion it is advisable for this corporation to donate said 4397 shares of stock of said Golden State company to the latter corporation and he asked the consideration of the directors with respect to the proposal. Upon motion of Director M. Naify, seconded by Director McNeil, the following resolution was then passed without dissenting voice:

Resolved, that this corporation convey to Golden State Theatre & Realty Corporation 4397 shares of the stock of the last named corporation now owned by this corporation and that if in the judgment of this corporation's accountant said transaction should be so handled, said conveyance be by way of a donation made by this corporation to said Golden State Theatre & Realty Corporation.

Upon motion of Director M. Naify, seconded by Director J. A. Naify, the corporation is authorized to open a bank account with The Anglo California National Bank of San Francisco, Jones and Market Branch, and withdrawals were authorized upon [36] the single and separate signature of E. H. Emmick, M. Naify, J. A. Naify and R. A. McNeil.

The president then requested the secretary to read the names of those persons who are now the officers and directors of the corporation. They were read and are as follows:

President and Director	E. H. Emmick
Vice President and Director	M. Naify
Treasurer and Director	R. A. McNeil
Director	J. A. Naify
Secretary	L. S. Hamm
Assistant Secretary	Hazel Watson

There being no further business to come before the board, the meeting adjourned, subject to call.

L. S. HAMM

Secretary

[Endorsed]: U. S. B. T. A. Filed at hearing Oct. 15, 1940. [37]

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[Title of Board and Cause.]

### PRAECIPE FOR TRANSCRIPT

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of

Appeals for the Ninth Circuit, heretofore filed by the above-named petitioner:—

1. Docket entries of the proceedings before the Board.

2. Petition filed on February 21, 1940.

3. Answer to petition filed on March 26, 1940.

4. Findings of Fact and opinion of the Board, promulgated on March 28, 1941.

5. Order denying motion for review by entire Board entered on April 29, 1941. [38]

6. Order denying reconsideration entered on May 3, 1941.

7. Petition for review filed on July 16, 1941.

8. Notice of filing petition for review filed on July 16, 1941.

9. Stipulation of Facts and exhibits attached thereto, filed on October 15, 1940.

10. Orders enlarging time for transmission and delivery of documents.

11. This Praecipe for Record.

12. Notice of filing this Praecipe for Record and the admission of service thereof.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

L. S. HAMM

B. E. KRAGEN

Attorneys for Petitioner.



Service of a copy of this Praeceptum is hereby admitted this 4th day of August, 1941.

(S) J. P. WENCHEL

Chief Counsel

Bureau of Internal Revenue

Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed Aug. 4, 1941.

[39]

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[Title of Board and Cause.]

To: The Hon. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.

Please take notice that on the 4th day of August, 1941, the undersigned, attorneys for Golden State Theatre & Realty Corporation, the petitioner in the above entitled proceeding, has filed with the Clerk of the United States Board of Tax Appeals a Praeceptum for Record, a copy of which is annexed hereto.

L. S. HAMM

B. E. KRAGEN

Attorneys for Petitioner.

Dated: August 4, 1941. [40]

Receipt of the foregoing Notice of Filing the Praeceptum for Record and service of a copy of the

Praecipe herein mentioned is acknowledged this 4th day of August, 1941.

J. P. WENCHEL

Chief Counsel

Bureau of Internal Revenue

Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed Aug. 4, 1941.

[41]

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[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 41, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 15 day of Aug. 1941.

B. D. GAMBLE

Clerk,

United States Board of Tax  
Appeals.

[Endorsed]: No. 9902. United States Circuit Court of Appeals for the Ninth Circuit. Golden State Theatre & Realty Corporation, a California corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed August 29, 1941.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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United States Circuit Court of Appeals  
For the Ninth Circuit

No. 9902

GOLDEN STATE THEATRE & REALTY COR-  
PORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

To the Clerk of the Above Entitled Court:

You will please take notice that pursuant to subdivision 6 of Rule 19 of the above entitled Court petitioner above named desires to adopt as its points on appeal the assignments of error included

in the petition for review within the transcript of record in said matter and further that the record as certified to you by the Board of Tax Appeals be printed in its entirety.

Respectfully,

L. S. HAMM

B. E. KRAGEN

Attorneys for Petitioner.

[Endorsed]: Filed Sept. 5, 1941. Paul P. O'Brien,  
Clerk.

